LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 27 1965
JOHN F. DAVIS, CLERK

No. 400

In the

Supreme Court of the United States

OCTOBER TERM, 1965

ROBERT OWENS, EUGENE HOWELL, JOSEPH LYLE and ZENOBIA OWENS, a/k/a ZENOBIA McKINLEY,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SAM ADAM
134 North LaSalle Street
Suite 1622
Chicago, Illinois 60602
CE 6-5543
Attorney for Petitioners.

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

	PAGE
Judgment and Opinion of Court Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Reasons for Granting the Writ	4
1. Much grave and serious uncertainty subsists in the present law as to what private papers seized incidental to an arrest may be admitted into evidence against the owner.	4
2. An arrest for a minor traffic violation, without more, will not justify the search of the trunk of a car, nor the complete stripping of the driver without a search warrant. The validity of such a search should be determined by Federal standards of reasonableness.	8
3. This court should at long last, define and demarcate the legal boundaries and limitations in what has become a morass of conflict embodied in the catch-all phrase "conspiracy."	10
Conclusion	11
Appendix:	
Opinion	1a
Petition for Rehearing denied	8a

PAGE

AUTHORITIES

Abel v. United States, 262 U.S. 217, 4 L.ed. 2d 668, 80 S.Ct. 683 5

Harris v. United States, 331 U.S. 145, 91 L.ed. 1399, 675 S.Ct. 1098 5

Ker v. California, 374 U.S. 23, 10 L.ed. 2d 726, 83 S.Ct. 1623 10

Mapp v. Ohio, 367 U.S. 643, 6 L.ed. 2d 1081, 81 S.Ct. 1684 10

Marron v. United States, 275 U.S. 192, 72 L.ed. 231, 48 S.Ct. 74 ..... 5, 6, 7

Mooring v. United States, 369 U.S. 844 (1962) 5

Stanford v. Texas, 85 S.Ct. 506 ..... 7, 8

United States v. Boyette, 299 F. 2d 92 (4th Cir.) 5, 6, 7

United States v. Di Re, 332 U.S. 581, 92 L.ed. 210, 68 S.Ct. 222 9

United States v. Lefkowitz, 285 U.S. 452, 76 L.ed. 877, 52 S.Ct. 420 7

United States v. Rabinowitz, 339 U.S. 56, 94 L.ed. 653, 70 S.Ct. 430 5

United States v. Viale, 312 F. 2d 595 (2nd Cir.) 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No.

ROBERT OWENS, EUGENE HOWELL, JOSEPH LYLE and ZENOBIA OWENS, a/k/a ZENOBIA McKINLEY,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners, Robert Owens, Eugene Howell, Joseph Lyle, and Zenobia Owens, a/k/a Zenobia McKinley pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

JUDGMENT AND OPINION OF THE COURTS BELOW:

The judgment of United States District Court for the Northern District of Illinois, Eastern Division, was entered on April 1, 1964, and is not reported, but appears in the record filed with and certified by the Clerk of the Court of Appeals, and transmitted herewith.

The opinion of the United States Court of Appeals for the Seventh Circuit affirming said judgment was entered on June 2, 1965, and has not been reported in the Federal Reporter as yet, but is set forth in the appendix hereto.

The petition for rehearing was denied June 29, 1965. The order denying the petition for rehearing is also set forth in the appendix.

JURISDICTION.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit was entered on June 2, 1965, and the Petition for Rehearing was denied on June 29, 1965. The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED.

I.

Are private papers (address books and other papers) seized from petitioners' homes at the time of their arrest after an indictment has been returned, but not pursuant to any search warrant, admissible in evidence against petitioners?

II.

What are the limitations imposed upon the authority of a state police officer to search pursuant to an arrest for a minor traffic violation, and is the validity and reasonableness of that state arrest, search and seizure to be governed by federal standards of reasonableness when the proceeds of that state arrest, search and seizure are offered into evidence in a federal prosecution?

III.

Is a conspiracy to violate the narcotic laws legally proven where the only connecting links between several unrelated episodes are purported hearsay statements, some of which purported statements admitted into evidence were not even made by persons on trial?

STATUTES INVOLVED.

The statutory provisions involved are Section 4105(a), Title 26 U.S.C., and Section 174, Title 21, U.S.C.

STATEMENT OF THE CASE.

Petitioners Robert Owens, Eugene Howell, Joseph Lyle and Zenobia Owens, together with one Morris Thomas, were charged as defendants in count five of a five count indictment with having, from on or about November 1, 1962, and continuing to on or about May 5, 1963, conspired, combined and confederated with each other and with divers other persons unknown to the Grand Jurors, to receive, conceal, buy, sell and facilitate the transportation and concealment of unlawfully imported heroin, a narcotic drug, knowing it to have been imported into the United States contrary to law, in violation of Section 174, Title 21, U. S. C.

In counts one and two of the same indictment Petitioner Joseph Lyle was charged with substantive narcotic offenses.

In counts three and four of the same indictment one Morris Thomas was charged with substantive narcotic offenses.

Prior to the trial, Morris Thomas entered a plea of guilty.

Petitioners were found guilty by the jury. Petitioner Eugene Howell was sentenced to imprisonment for twelve (12) years; Petitioners Robert Owens and Joseph Lyle were each sentenced to imprisonment for ten (10) years; Petitioner Zenobia Owens was sentenced to imprisonment for five (5) years.

REASONS FOR GRANTING THE WRIT.

I.

MUCH GRAVE AND SERIOUS UNCERTAINTY SUBSISTS IN THE PRESENT LAW AS TO WHAT PRIVATE PAPERS SEIZED INCIDENTAL TO AN ARREST MAY BE ADMITTED INTO EVIDENCE AGAINST THE OWNER.

Petitioner Howell was arrested at his home at 4:30 a.m. by federal Agent Schnettler who admittedly had no warrant, although he testified he had heard that a Bench Warrant had been issued for Howell's arrest. The agent testified that the arresting officers went through the bureau drawers and all sections of the house but found no contraband. However, the officers did seize two address books belonging to Petitioner Howell.

At the trial these address books were admitted over objection into evidence as Government Exhibits 5 and 6.

Government Exhibit 7, which was also the subject matter of a motion to suppress, was found during the search of the home of petitioner, Zenobia Owens, at the time of her arrest. Government Exhibit 7, a slip of paper upon which was written a number, was in a purse on a dressing table in her bedroom. Here again, the officers, who had no arrest warrant in their possession (although Agent Schnettler testified he had heard that one was outstanding), and no search warrant, opened the drawers and searched the woman's garments extensively. No contraband was discovered, but the agents seized petitioner's purse containing a slip of paper (Exhibit 7), later introduced into evidence over timely objections.

In sustaining the trial court's decision admitting these articles and affirming petitioners' convictions, the Court

of Appeals for the Seventh Circuit relied upon the following authorities:

> *Harris* v. *United States,* 331 U.S. 145, 91 L. ed. 1399, 67 S. Ct. 1098 (1945); *Abel* v. *United States,* 262 U.S. 217, 4 L. ed. 2d. 668, 80 S. Ct. 683 (1960); *United States* v. *Rabinowitz,* 339 U.S. 56, 94 L. ed. 653, 70 S. Ct. 430 (1960); *Marron* v. *United States,* 275 U.S. 192, 72 L. ed. 231, 48 S. Ct. 74 (1927); *United States* v. *Boyette,* 299 F. 2d 92 (4th Cir.), *cert denied sub nom. Mooring* v. *United States,* 369 U.S. 844 (1962).

None of the cases cited by the Circuit Court of Appeals is applicable.

In *Harris* v. *United States,* 331 U.S. 145, the defendant was charged with the unlawful possession of the very articles seized (*i.e.* Notice of Classification cards and Registration Certificates). The possession of those articles was itself the crime. Not so here. Here there was nothing illegal about the papers seized from petitioners.

In *Abel* v. *United States,* 362 U.S. 217, the defendant was charged with the crime of espionage and the articles seized were all documents by which the accused concealed his true identity in order to perpetrate the crime of espionage. Truely, the papers seized in *Abel* were the *means* of committing the crime. But in nowise can it be said that an address book and a slip of paper containing a telephone number are the *means* of committing, as distinguished from mere *evidence* of a crime.

The Court of Appeals also cited *United States* v. *Rabinowitz,* 339 U.S. 56, in justification of its position sustaining the seizure of these petitioners' private papers. Rabinowitz was convicted of selling and possessing and

concealing altered obligations of the United States with intent to defraud. But, as in the *Harris* case (331 U.S. 145) discussed above, and in contradistinction with the instant cause, the articles seized from Rabinowitz (forged stamps) were the very articles which Rabinowitz was charged with illegally possessing.

Furthermore, in *Rabinowitz*, the search and seizure took place in a area open to the public generally and was pursuant to an arrest warrant, whereas the instant search was of a private home at 4:30 a.m. without a warrant.

Marron v. *United States*, 275 U.S. 192 is also relied upon by the Court of Appeals for the Seventh Circuit in reaching its determination that the seizure of the petitioners' private papers was justified. In *Marron* the defendant was actually engaged in committing a crime in the very presence of the officers, and the place of the arrest was itself declared to be a nuisance by the National Prohibition Act. In *Marron* the ledgers were held to be the "things by which the nuisance was being maintained." 275 U.S. 192, 199, 72 L. ed. 238. Again, in distinction to *Marron*, the instant petitioners were arrested in their homes, they were not committing any crime when arrested, their homes were not being used for illegal activity, and the articles seized therefrom were not "things" by which any crime was maintained.

Lastly, the Court of Appeals for the Seventh Circuit cites and relies upon *United States* v. *Boyette*, 299 F. 2d. 92 (1962). In this Fourth Circuit cause, a divided (2-1) court held that where the defendant was charged with the interstate transportation of a woman for purposes of prostitution certain guest checks were admissible as "instrumentalities used in the operation of the brothel. . ." (299 F. 2d. 92, 95).

Records of illegal transactions are of course, distinguishable from address books and a paper containing a phone number. But in spite of this distinguishing feature, Chief Justice Sobeloff wrote an extremely well reasoned dissent. Unfortunately, certiorari was denied in *United States* v. *Boyette*, supra, *(Sub nom Mooring* v. *United States*, 369 U.S. 844, 7 L. ed. 2d 848, 82 S. Ct. 875, Mr. Justice Douglas being of the opinion that certiorari should be granted,) and we are forever precluded from knowing whether Chief Justice Sobeloff's view would have prevailed.

United States v. *Boyette*, 299 F. 2d 92, clearly illustrates the acute divergency of opinion as to just what private papers belonging to an accused may be seized incidental to an arrest and be used against him at his trial. Only this Court can clarify this conflict in authorities, and determine with some degree of finality what private papers are admissible, and what private papers are not admissible in evidence.

It would seem that *United States* v. *Lefkowitz*, 285 U.S. 452, 76 L. ed. 877, 52 S. Ct. 420, 82 ALR 775 is exactly in point and it is strange that neither the Government in its brief in the Court of Appeals, nor does the Court of Appeals in its opinion attempt to distinguish *Lefkowitz* from the case at bar.

Just last term, the principle of the sanctity of one's papers was again passed upon by this Court. In *Stanford* v. *Texas*, 85 S. Ct. 506, the defendant's books were seized pursuant to a search warrant. The Supreme Court, citing the very case relied upon by the Court of Appeals to sustain the instant seizure, *Marron* v. *United States*, 275 U.S. 192, held that the search warrant was too broad to sustain the seizure of the defendant's books and private papers.

This court is now exhorted to apply the rule of *Stanford v. Texas*, 85 S. Ct. 506, to searches conducted without search warrants.

II.

AN ARREST FOR A MINOR TRAFFIC VIOLATION, WITHOUT MORE, WILL NOT JUSTIFY THE SEARCH OF THE TRUNK OF A CAR, NOR THE COMPLETE STRIPPING OF THE DRIVER WITHOUT A SEARCH WARRANT. THE VALIDITY OF SUCH A SEARCH SHOULD BE DETERMINED BY FEDERAL STANDARDS OF REASONABLENESS.

Petitioners Eugene Howell and Robert Owens, were proceeding westbound on the Pennsylvania Turnpike. Howell was driving. A Pennsylvania State police officer, Officer Szanca, testified Howell was driving at speeds up to and including 70 miles an hour when he stopped him. Without a search warrant the officer searched the trunk of the car and discovered certain tools of a narcotic addict. The occupants of the car could not show written permission to use the car, and were thereupon taken to the state police station. At that place Howell was completely searched and about eighteen (18) grams of heroin was discovered in his shoe. After the motion to suppress these articles was overruled, testimony concerning the above mentioned arrest, search and seizure was presented to the jury.

The search of the automobile which the defendant Howell was driving on the Pennsylvania Turnpike was unwarranted and unreasonable in light of all the circumstances surrounding it. The search of private automobiles after the driver has been stopped for a mere traffic violation is fast becoming the indignity of the decade wherein we all subject ourselves to the possibility of a general

search every time we drive a car. This, obviously, the framers of the Constitution never intended. Arrests for traffic violations have brought forth a line of cases which are unique in and of themselves. If we consider that the right to search incidental to a valid arrest is confined solely to fruits, instrumentalities or contraband connected with *the* crime for which the occupant of the automobile is arrested, then, is there a "product" of the crime of speeding, passing a light, illegal parking, improper turn, etc?

This Court should determine the limits, and reasonableness of such a search with the finality with which only this Court can decide the question.

In holding the arrest, search and seizure valid the United States Circuit Court of Appeals issued the following pronouncement:

> ". . . The arrest was valid under Pennsylvania law, which controls that question. *United States* v. *Di Re*, 332 U.S. 581 (1948); *United States* v. *Viale*, 312 F. 2d. 595, 599 (2d. Cir.) cert. denied 373 U.S. 903 (1963)"

It is quite true that Petitioner Howell was arrested for speeding in Pennsylvania by a Pennsylvania State policeman.

It is also quite true that *United States* v. *Di Re*, 332 U.S. 581, held, in part, that absent an act of Congress laying "down a general federal rule for arrest without warrant" the validity of an arrest would be governed by state law.

However, *United States* v. *Di Re* was decided in 1948, at a time when the Fourth Amendment had not been held to apply to the States by virtue of the Fourteenth.

But in 1961 this Supreme Court held in *Mapp* v. *Ohio*, 367 U.S. 643, 6 L. ed. 2d 1081, 81 S. Ct. 1684, that the Fourth Amendment applied to, was binding upon, and was enforceable against the States by virtue of the Fourteenth Amendment's Due Process Clause, "by the same sanction of exclusion as is used against the Federal Government." 6 L. ed. 2d 1081, 1090.

The Supreme Court re-emphasized this principle in *Ker* v. *California*, 374 U.S. 23, 10 L. ed. 2d 726, 83 S. Ct. 1623, (1963).

Thus, most respectfully, the Circuit Court of Appeals for the Seventh Circuit would seem to have misapplied the law. The validity of the arrest of Howell in Pennsylvania, and, more important, the reasonableness of the search of the trunk of the automobile following that arrest, and the further complete search of his person is not to be determined by state law, as that court says it is to be. It is, rather, to be determined by Fourth Amendment principles as enunciated by this Honorable Court, and therefore its assertion (*supra*) to the effect that the state law controls is not an accurate one, and this court is now urged to so hold.

III.

THIS COURT SHOULD, AT LONG LAST, DEFINE AND DEMARCATE THE LEGAL BOUNDARIES AND LIMITATIONS IN WHAT HAS BECOME A MORASS OF CONFLICT EMBODIED IN THE CATCH-ALL PHRASE "CONSPIRACY".

The government here charged a conspiracy. At most, the evidence showed several unrelated episodes which were connected, if at all, by hearsay and "double hearsay" statements, many of which were merely thin inferences.

To cite only one of the more flagrant examples of the absence of judicial observance of the established rules of evidence, the trial court in this case went so far as to admit into evidence hearsay statements against a co-indictee, Morris Thomas, even though Morris Thomas had pled guilty and was not even on trial. The flagrant prejudice to the petitioners from such procedure is obvious.

Somewhere the ancient and time-honored rules of evidence and trial procedure, to say nothing of fair play, must be observed. Yet the courts seem to go further and further in the relaxation of these rules on the theory that it is a "conspiracy case."

This court has never directly ruled on this question as it is now urged so to do.

CONCLUSION.

We Importune This Honorable Court to Grant Its Writ of Certiorari.

Respectfully submitted,

SAM ADAM
134 North LaSalle Street
Suite 1622
Chicago, Illinois 60602
CE 6-5543
Attorney For Petitioners

APPENDIX.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 14681 SEPTEMBER TERM, 1964—APRIL SESSION, 1965

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ROBERT OWENS, EUGENE HOWELL, JOSEPH LYLE and ZENOBIA OWENS, a/k/a ZENOBIA McKINLEY,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 2, 1965

Before KNOCH, CASTLE and KILEY, *Circuit Judges.*

KILEY, *Circuit Judge.* Defendants appeal from their convictions, by a jury, of narcotics laws violations: Lyle under two substantive counts,[1] and all under a conspiracy count.[2] We affirm.

[1] Charging a sale of heroin to a federal narcotics agent in violation of 26 U.S.C. §4705(a) and fraudulently and knowingly receiving, concealing and facilitating the transportation and concealment, after unlawful importation, of a quantity of heroin, knowing it to have been unlawfully imported into the United States, in violation of 21 U.S.C. §174.

[2] Charging conspiracy to violate 21 U.S.C. §174.

Defendants contend that the evidence was not sufficient to sustain the verdicts finding them members in, and guilty of, the general conspiracy charged in the indictment. On this contention we must view the evidence and draw the inferences therefrom in the light most favorable to the Government. *Glasser* v. *United States*, 315 U.S. 60, 80 (1941); *United States* v. *Iacullo*, 226 F. 2d 788, 795 (7th Cir. 1955), *cert. denied* 350 U.S. 966 (1956).

There is ample evidence from which the jury could infer that Eugene Howell and Robert Owens were at the top of a heroin hierarchy and that the narcotics passed from them down through "Red" Thomas and Joseph Lyle —all aided by Zenobia Owens—to the addicts at the base, and that they all knowingly joined in the unlawful conspiracy charged in the indictment. That the members had varied duties does not change the fact that they all acted in furtherance of the same conspiracy. *United States* v. *Micele*, 327 F. 2d 222, 225 (7th Cir. 1964); *United States* v. *Wenzel*, 311 F. 2d 164 (4th Cir. 1962); *Poliafico* v. *United States*, 237 F. 2d 97 (6th Cir. 1956), *cert. denied* 352 U.S. 1025 (1957).

There is evidence that Marvin Moses in looking for a source of narcotics was introduced by Owens to "Red" Thomas; that when Moses called the number given him by Thomas, Zenobia Owens would take the messages for Thomas; that Thomas sold narcotics to Moses; that Zenobia Owens, at least once, picked up money for Thomas at the place where the money and narcotics were customarily exchanged; that Moses later became an informer and introduced Agent Gibson to Thomas, who sold Gibson heroin; that Howell and Owens were arrested together on the Pennsylvania Turnpike and Howell was found in possession of narcotics; that Howell admitted to the Pennsylvania police that he was returning from a trip to New York to obtain narcotics; that following the arrests Thomas told Moses he could not do anything for him then because "his men" had been arrested in Pennsylvania; and that Thomas later told Gibson that "his people . . . had gotten popped" on the Turnpike but that the stuff that was found did not belong to "his man, Robert."

There is evidence also that Lyle sold a small sample of heroin to Agent Dayle and told him there would be a delay in supplying larger quantities because "my people" were arrested on the Pennsylvania Turnpike, but that he would have heroin in quantity for Dayle "as soon as they get back from Pennsylvania" and that Lyle also said "they found the stuff on Gene."

The evidence is further that Moses brought together Dayle and Owens, who said his "partner" and he "got busted along the turnpike"; that Owens gave Dayle the same telephone number given to Gibson by Thomas; that Owens and Thomas were seen together in a night club and that Thomas, after making sales of narcotics, went to a house where he was let in by Owens; that Owens drove Lyle's car on several occasions; that Thomas gave Gibson a second telephone number to use; and that Owens was the owner of the building in which were located the two telephones involved in the transactions, one registered to Zenobia Owens and the other to Lily Starkey, who owned the car in which Owens and Howell were arrested.

We think this evidence was clearly sufficient to support the jury's verdict.

Defendants challenge the rulings of the district court in denying motions to suppress heroin seized from Howell by the Pennsylvania State Police following his arrest there and in refusing to suppress evidence seized from the residences of Howell and Zenobia Owens at the time of their arrests.

Howell was driving with Owens and one Hightower in a new Cadillac convertible on the Pennsylvania Turnpike when he was arrested for speeding. An on-the-spot interrogation disclosed the suspicious circumstance that the car was registered in the name of Lily Starkey, whom Howell said he did not know and from whom neither Owens nor Howell could show permission to drive the car. The Pennsylvania officer, suspecting that the car was stolen, questioned Owens about the contents of the trunk,

which Owens opened, revealing three suitcases. Owens disclaimed ownership of one of the suitcases, which was unlocked, and when opened by the officer contained, in open view, a crude hypodermic needle of a type used by addicts. Searching further in the suitcase the officer found a burnt spoon with a bent handle, also an addict's tool, and a loaded revolver. A search of Howell at the police station disclosed in his shoe a package of nearly pure heroin.

It is clear from the facts in the record that the arrest for speeding was not "a mere excuse to search" for narcotics as in *Tagalvore* v. *United States*, 291 F. 2d 262, 265 (9th Cir. 1961), and that the arrest was valid under Pennsylvania law,[3] which controls that question. *United States* v. *Di Re*, 332 U.S. 581 (1948); *United States* v. *Viale*, 312 F. 2d 595, 599 (2d Cir.) *cert. denied* 373 U.S. 903 (1963). The surrounding circumstances justified the arresting officer in suspecting that he was dealing with a situation more serious than routine speeding and he had reasonable grounds for believing that the car might be stolen. There is nothing to indicate that the officer suspected the presence of any narcotics or other violation until the suitcase was opened, disclosing the needle. Considering the situation which faced the officer, his attempts to determine whether the car was stolen were not unreasonable or violative of the Fourth Amendment, and the evidence which was turned up was not the fruit of any "poisonous tree."

The arrests of Howell and Zenobia Owens in Chicago were concededly valid. The question is whether the district court erroneously ruled that the attendant searches were not unreasonable under the Fourth Amendment. Both Howell and Zenobia Owens were arrested on May 6, 1963. At Howell's home two books lying in open view

[3] The Pennsylvania state policeman clocked the speed of the car as being in excess of the 70 m.p.h. speed limit of Title 75 Pennsylvania Statutes, Section 1002, and he made the arrest for speeding pursuant to his authority under Title 71 Pennsylvania Statutes, Section 252.

were seized, each containing the second telephone number given to Gibson by "Red" Thomas, and the notation "Red." In the residence of Zenobia Owens a slip of paper bearing the same number and notation "Red" was found in her purse in the bedroom.

Defendants argue that the books and slip of paper were seized unlawfully in a general search "solely for evidence." There is no merit in the argument. The items were seized pursuant to a lawful arrest where the officers were looking for "Contraband, fruits of the crime," as the arresting officer testified. The items seized were closely related to the means of communication by telephone essential to the successful conduct of the conspiracy and fall within the class of instrumentalities of crime properly subject to seizure incident to arrest.[4] *Harriss* v. *United States*, 331 U.S. 145 (1947); *Abel* v. *United States*, 362 U.S. 217 (1960); *United States* v. *Rabinowitz*, 339 U.S. 56 (1950); *Marron* v. *United States*, 275 U.S. 192 (1927); *United States* v. *Boyette*, 299 F. 2d 92 (4th Cir.), *cert. denied sub nom. Mooring* v. *United States*, 369 U.S. 844 (1962).

Lyle was charged with selling heroin on February 15, 1963 to Agent Dennis Dayle, and with fraudulently and knowingly receiving, concealing and facilitating the transportation and concealment of unlawfully imported heroin on the same day. The evidence taken most favorably for the Government, *United States* v. *Iacullo*, 226 F. 2d 788, 795 (7th Cir. 1955), substantially proves the offenses charged.

---

[4] "The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted." *Harriss* v. *United States*, 331 U.S. 145, 151 (1947), quoting *Agnello* v. *United States*, 269 U.S. 20, 30 (1925).

Lyle testified in support of his defense of entrapment that his friend and former attorney, who had become a Government informer, by persistent importuning arranged the meeting with Dayle. Dayle's testimony shows that Lyle readily agreed to the transaction and that he tried to impress Dayle with his connection with Owens and Howell, and spoke of doing business "in a million dollar way." In this testimony and that of Agent Cook, in rebuttal, of sales of narcotics by Lyle to him in April 1962, the jury had sufficient basis to find that Lyle was predisposed to the transaction and was not entrapped.

Defendants contend that Cook's testimony was improper and prejudicial to them since the testimony was of transactions unconnected with the charges in the indictment. The testimony was proper as an inquiry into Lyle's predisposition to commit the crime, *Sorrells* v. *United States*, 287 U.S. 435, 451 (1932), and the court's instructions to the jury properly limited the rebuttal testimony to Lyle's defense of entrapment. The other defendants, therefore, were not prejudiced.

The judgments are affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60610

Wednesday, June 2, 1965

Before
Hon. Win C. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge

No. 14681
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ROBERT OWENS, EUGENE HOWELL, JOSEPH LYLE and ZENOBIA OWENS, a/k/a ZENOBIA McKINLEY,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments of the said District Court in this cause appealed from be, and the same are hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60610

Tuesday, June 29, 1965

Before
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge

No. 14681
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ROBERT OWENS, EUGENE HOWELL, JOSEPH LYLE, ZENOBIA OWENS, a/k/a ZENOBIA MCKINLEY,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, denied.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60610

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing ..... pages contain a true copy of

1. The opinion of this Court, filed on June 2, 1965.
2. The judgment of this Court, filed on June 2, 1965.
3. The order, entered by this Court on June 29, 1965, denying the petition for rehearing.

Cause No. 14681

United States of America, Plaintiff-Appellee

vs.

Robert Owens, Eugene Howell, Joseph Lyle and Zenobia Owens, a/k/a Zenobia McKinley, Defendants-Appellants as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this first day of July A.D. 1965.

/s/ Kenneth J. Carrick
Clerk of the United States Court of
Appeals for the Seventh Circuit.
By: Thomas F. Strubbe, Deputy Clerk

(Seal)

BLANK
PAGE

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	8
Conclusion	12

CITATIONS

Cases:

Abel v. *United States*, 362 U.S. 217	10
Blumenthal v. *United States*, 332 U.S. 539	10
Brinegar v. *United States*, 338 U.S. 160	9
Draper v. *United States*, 358 U.S. 307	9
Grillo v. *United States*, 336 F. 2d 211, certiorari denied *sub nom. Gorin* v. *United States*, 379 U.S. 971	10
Krulewitch v. *United States*, 336 U.S. 440	11
Lutwak v. *United States*, 344 U.S. 604	11
Marron v. *United States*, 275 U.S. 192	10
Stanford v. *Texas*, 379 U.S. 476	10
United States v. *Boyette*, 299 F. 2d 92, certiorari denied *sub nom. Mooring* v. *United States*, 369 U.S. 844	10
United States v. *Lefkowitz*, 285 U.S. 452	10

Statutes:

21 U.S.C. 174	2
71 Purdon's Penna. Statutes Ann. § 252	8

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 400

ROBERT OWENS, EUGENE HOWELL, JOSEPH LYLE and ZENOBIA OWENS, a/k/a ZENOBIA MCKINLEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-6) is reported at 346 F.2d 329.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1965 (Pet. App. 7). A petition for re-

hearing was denied on June 29, 1965 (Pet. App. 8). The petition for a writ of certiorari was filed on July 27, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether heroin obtained from petitioner Howell by Pennsylvania police was properly admitted into evidence against him.

2. Whether notations of a name and telephone number were subject to seizure as instrumentalities of crime where use of the telephone was an integral part of the conspiracy.

3. Whether the evidence is sufficient to support the conspiracy conviction.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of conspiracy to conceal and sell unlawfully imported heroin in violation of 21 U.S.C. 174 (count 5; R. 12-13, 643-644).[1] Petitioner Lyle was additionally convicted of two substantive narcotics offenses (counts 1-2; R. 10-12, 643-644). Petitioners were sentenced as follows: Owens to 10 years' imprisonment; Howell, as a second offender (R. 69-70), to 12 years; Lyle to 10-year concurrent sentences on each of counts 1, 2 and 5; and Zenobia

[1] "R." designates the Appendix in the court of appeals now on file with this Court.

Owens to 5 years' imprisonment (R. 75, 656-657).[2] The court of appeals affirmed (Pet. App. 1-6).

1. The government's evidence showed that some time in early November 1962, one Marvin Moses met with petitioner Robert Owens and told him that he was "looking for a connection" to purchase a "large quantity of narcotics" (R. 85-86). A few days later, Moses met with Owens and "Red" Thomas, who, according to Owens, could supply Moses' needs (R. 86-87). Thomas told Moses that he could sell him "half a kilo" of heroin for $12,500 and gave Moses a telephone number at which to reach him (R. 87). Thereafter, on "six or seven" separate occasions, Thomas gave Moses large quantities of narcotics on consignment, for which Moses paid him after diluting and selling the goods at a substantial profit (R. 93-95). On at least one occasion when Moses called the telephone number given him by Thomas, Zenobia Owens answered and relayed his message to Thomas (R. 88, 90-91); on other occasions Moses met with Zenobia and gave her the money owing to Thomas (R. 96-97).

On February 14, 1963, petitioners Eugene Howell and Robert Owens were arrested on the Pennsylvania Turnpike by State police (see *infra*, pp. 6-8) who found a quantity of almost "pure" heroin in Howell's right shoe (R. 162-166, 193, 202-203, 248-249, 254-

---

[2] Morris "Red" Thomas, who was charged as a co-conspirator (count 5) and with two substantive offenses (counts 3-4), entered a plea of guilty prior to trial on all three counts (R. 3) and was sentenced to concurrent 8-year terms (R. 76-77, 659-663).

255).[3] This heroin was introduced at trial only against Howell (R. 525, 527). Also introduced only against Howell was a statement he made to State authorities at the time of his arrest that he had purchased the heroin in New York and that Owens did not know of the purchase (R. 245-247, 527-528).

In early February 1963, Moses (at this time working as a government informer (R. 118, 122)) introduced undercover narcotics agent Louis Gibson to Thomas as Moses' "runner" who would "take over the action" (R. 97-98, 137). On February 13, Thomas told Gibson that his "people were in New York" and he would take care of the delivery when they returned (R. 139-140). On February 14, when Moses telephoned the number Thomas had given him, Zenobia Owens told him that "Owens and [Howell] had got arrested up in Pennsylvania" and she would have Thomas call him (R. 99-100). That evening Thomas told Moses that he could not then obtain any narcotics because "his men had gotten arrested up in Pennsylvania, and they had the key" (R. 101).

On February 15, agent Dayle had a meeting with petitioner Lyle (R. 330-333, 337-338). Lyle told the agent that he could get him narcotics at $15,000 a kilo but could not make immediate delivery because his "people" had "just got busted on the Pennsylvania Turnpike." He asked whether Dayle knew "Bob Owens" and stated that it did not make any dif-

---

[3] Howell entered a plea of guilty to a State charge of possession of these narcotics and was placed on probation (R. 186-188).

ference "whether [Owens was] bsuted or not. He is safe. That goes for his partner, too. * * * Gene and Bob are as safe as you can find." He explained, as to the turnpike incident, that "Bob" did not have much to do "with the whole thing" since they "found the stuff on Gene"; and that he would have heroin available "[a]s soon as they [got] back from Pennsylvania" (R. 340-341). The agent obtained an "ounce" sample of heroin from Lyle that evening (counts 1-2; R. 342-344).

On February 20, 1963, six days after the turnpike incident, Thomas telephoned Moses and said he had his "package" for him. He delivered a quantity of heroin to agent Gibson later that night (R. 101-103; 142-143), and was thereafter seen to enter Howell's apartment in which petitioner Owens was then present (R. 269-270, 347-349, 376, 380-381). Gibson purchased heroin from Thomas on several occasions thereafter, after making arrangements over the telephone, using the number Thomas had given to Moses (*supra*, p. 3). A number of these times, Zenobia answered the telephone and made the arrangements for the meeting (R. 142-150, 350-351). At one of these meetings with "Red" Thomas, after giving him $2,000 for heroin, agent Gibson told him that he had been having a "hard time getting in touch with him" through the previously given telephone number. Thomas agreed that "there had been some difficulty" in getting the telephone messages and told Gibson that he should telephone him at PL 2-7624. He gave the agent a card bearing that telephone number (R. 150-151, 161-162). At the time of their arrests on federal warrants on May 6, 1963, papers bearing this

telephone number and the name "Red" were found at the homes of Howell and Zenobia Owens (R. 273-274, 282, 288, 325).[4] These items were introduced only against the particular defendant on whose premises they were found (R. 296, 525, 527).

On March 22, 1963, Moses introduced agent Dayle to Robert Owens (R. 106, 354-355). Owens told the agent that "Red [was] working for" him; that, at the moment, he and his partner were "in a little difficulty, because [they] got busted along the turnpike"; that, although he was "all right", he did not know how his partner was "going to make out." Owens gave Dayle a telephone number at which he could be reached—the same number that Thomas had given Moses earlier (*supra*, p. 3; R. 356-357).

2. During the trial, petitioner Howell moved to suppress the narcotics seized from him by Pennsylvania police.[5] The pertinent evidence showed that, on February 14, 1963, Howell was arrested for speeding on the Pennsylvania Turnpike while driving with Robert Owens and one Leo Hightower (R. 164-165, 167-170). After the car had been stopped, the officer asked Howell for his operator's permit and the registration certificate (R. 176). Howell showed

---

[4] In Howell's case, the notations were in two books lying in open view in his house. In Zenobia Owens' case, the notation was on a slip of paper found in her purse (R. 273-274, 290-291).

[5] Counsel for petitioner Owens withdrew his motion to suppress after government counsel stated that, with respect to the Pennsylvania arrest, he did not intend to introduce at trial "any conversations with defendant Owens. Anything found on the defendant Owens" (R. 173).

the officer his driver's license, but said Owens had the registration (R. 176). Owens then pulled out a registration card from the glove compartment and gave it to the officer (R. 176-177). Owens told the officer that the owner of the car was "a relation to him," Thurmond Starkey (the name appearing on the registration certificate), but that he did not know Starkey's address, although the address was shown on the registration card (R. 177-178). Owens was unable to present any personal identification to the officer (R. 178). Howell, when questioned, said he did not know Starkey (R. 179), and neither he nor Owens was able to show permission to operate the vehicle. The officer, suspecting the car was stolen, asked what was in the trunk and was told a "couple of suitcases" (R. 179-180). To "get more positive identification and proof of ownership of the vehicle" (R. 180-181) the officer had Owens open the trunk. It contained three suitcases, which Owens said were not his but belonged to "a fellow in the car" (R. 180). Owens said he did not believe that the suitcases were locked and the officer or Owens opened one (R. 180-181). The officer immediately saw in plain view in the suitcase a "homemade form of an eye dropper, with a hypodermic needle on the end, fastened with a gum band" (R. 181). The form indicated to the officer that it was not a "commercial needle" used by diabetics, but the kind used by narcotics addicts (*ibid*). Searching further, the officer found a bent spoon "burned on the bottom" and a loaded .38 caliber revolver (R. 182). The three men were then taken to local police headquarters. Howell was

searched and a quantity of almost pure heroin was removed from one of his shoes (R. 183, 193, 202-203, 248-249, 255).[6] The trial court denied the defense motion to suppress this heroin (R. 190).

ARGUMENT

1. The narcotics introduced only as against petitioner Howell (G. Ex. 2A-2C; R. 527) was obtained as a result of a lawful search and seizure by Pennsylvania State police. Howell does not deny that the arresting officer was justified in stopping the car in which he and petitioner Owens were riding for speeding on the Pennsylvania Turnpike.[7] After receiving unsatisfactory responses from Owens and Howell as to who owned the vehicle, the officer was justified in suspecting that the automobile was stolen (R. 181) and therefore properly could proceed to check the contents of the trunk in order to verify Owens' vague assertion that the trunk contained a "couple of suitcases" belonging to "a fellow in the car" (R. 180). Once the officer saw the hypodermic needle in the opened suitcase, he properly suspected a

---

[6] This narcotics was introduced at trial only against petitioner Howell (G. Ex. 2A-2C; R. 527). A signed and sworn statement which Howell gave to the local police (R. 211-214, 222-224) was admitted into evidence at trial limited also to petitioner Howell (R. 214, 527-528) and the jury was so instructed (R. 221-222).

[7] 71 Purdon's Penna. Statutes Ann. § 252, authorizes a State police officer, *inter alia*, "[t]o make arrests, without warrant, for all violations of the law, including laws regulating the use of the highways * * *."

narcotics violation. Upon finding the additional narcotics paraphernalia and the loaded revolver, the officer was fully justified in arresting petitioners and taking them to police headquarters where narcotics was discovered in one of Howell's shoes. The police acted at all times on "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar* v. *United States*, 338 U.S. 160, 175; *Draper* v. *United States*, 358 U.S. 307, 313. Accordingly, as the court below found, their conduct was "not unreasonable or violative of the Fourth Amendment" (Pet. App. 4a).

2. The books and slip of paper bearing a telephone number and the notation "Red" were properly seized and admitted into evidence as instrumentalities of the crime charged. The use of the telephone was an integral part of the conspiracy. Arrangements for sales were made by telephone and its use was essential to buyers seeking to purchase narcotics for resale and to the co-consipirators seeking to effectuate their system of distribution. "Red" Thomas had given the number "PL 2-7624" to agent Gibson so that Gibson could more easily communicate with him in connection with their dealings. This same number was found on the papers in the possession of petitioners Howell and Zenobia Owens at the time of their arrests. As the court of appeals ruled, these items "were closely related to the means of communication by telephone essential to the successful conduct of the conspiracy and fall within the class of instrumentalities of crime properly subject to seizure inci-

dent to arrest" (Pet. App. 5). See *Abel* v. *United States*, 362 U.S 217, 237-238; *Marron* v. *United States*, 275 U.S. 192, 199; *United States* v. *Boyette*, 299 F.2d 92, 95 (C.A. 4), certiorari denied *sub nom. Mooring* v. *United States*, 369 U.S. 844; *Grillo* v. *United States*, 336 F.2d 211, 213 (C.A. 1), certiorari denied *sub nom. Gorin* v. *United States*, 379 U.S. 971.[8]

3. The evidence was more than ample to support the verdict on the conspiracy charge. It showed that petitioners Howell and Robert Owens were providing the heroin to salesmen "Red" Thomas and Joseph Lyle. Zenobia Owens acted in a secretarial capacity receiving messages for Thomas, making appointments for heroin transactions, and occasionally taking part in an illegal transaction (see Statement *supra*, pp. 3-6). The fact that not all of the petitioners might have known at any given moment all of the details of the illegal business or the exact duties of other conspirators does not show that the evidence established only "several unrelated episodes" (Pet. 10). On the contrary, the evidence plainly showed that each petitioner was part of the overall plan and that they were bound together "by their common single goal." *Blumenthal* v. *United States*, 332 U.S. 539, 558-559.

---

[8] *United States* v. *Lefkowitz*, 285 U.S. 452 and *Stanford* v. *Texas*, 379 U.S. 476, relied on by petitioners (Pet. 7-8), are inapposite, both involving broad exploratory searches. By contrast, the searches involved here were, as the court below found, "for 'Contraband [and] fruits of the crime'" (Pet. App. 5a).

Nor is there any merit to petitioner's claim (Pet. 10-11) that they were prejudiced because two government witnesses (Marvin Moses and narcotics agent Louis Gibson) were allowed to testify to statements of co-conspirator "Red" Thomas made in furtherance of the conspiracy (see R. 87, 92-95, 101-104, 113, 140-144, 148-151) although Thomas was not a defendant at the trial. Once having found that a conspiracy existed,[9] the jury was entitled to consider the acts and declarations of any conspirator (whether he was a defendant or not) in furtherance of the conspiracy as against all of the members thereof. *Lutwak* v. *United States*, 344 U.S. 604, 617; *Krulewitch* v. *United States*, 336 U.S. 440, 442-443.

---

[9] At the time of the testimony of Moses and Gibson, statements and acts they attributed to "Red" Thomas were admitted only as "to Thomas' part in the conspiracy" (see, *e.g.*, R. 91-92, 102, 114-115, 141-142).

At the close of the case, the trial judge correctly instructed the jury that it had to "find the existence of a criminal conspiracy" before it could consider the acts and declarations of one conspirator in furtherance of the "common object" against the other conspirators (R. 55-56).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

SEPTEMBER 1965.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 787414 197